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Supreme Court of the United States

NO. 521 OCTOBER TERM, 1925.

STANLEY P. ASHE, Warden of the State Penitentiary for the Western District of Pennsylvania, Plaintiff-in-Error,

VS.

UNITED STATES OF AMERICA, ex. rel. Joseph Valotta, Defendant-in-Error.

BRIEF FOR APPELLEE.

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I.

Opinions of the Courts Below.

The opinions delivered by the courts below in this case are reported in 2 Federal (2d) 735 and 279 Pa., 84.

II.

Statement of Grounds on Which Jurisdiction Invoked.

(1) The judgment of the court here appealed from was rendered December 19, 1924 (R-340), and the appeal was allowed on January 5, 1925 (R-341).

(2) Upon a writ of *habeas corpus* to discharge relator from custody of a state officer, who detained him by virtue of process issued out of a state court, based upon conviction of murder, relator claimed that he had been denied his right to due process of law and to the equal protection of the law as guaranteed under the Fourteenth Amendment to the Constitution of the United States as follows, (R-6 and 7):

(a)) No evidence to sustain a verdict of murder in the first degree.

(b)) By the trial of two separate indictments for two separate murders before one jury in the manner particularly set forth.

(c)) By depriving relator of the right of peremptory challenges under each indictment.

(d) By depriving relator of his rights under Act of Assembly of the Commonwealth of Pennsylvania of March 15, 1911, P. L. 20, prohibiting the questioning of defendant in regard to other crimes charged.

(e)) By depriving relator of his right to be tried on each indictment by an impartial jury.

(f) By depriving relator of his right to trial by jury of his peers.

(g) Omitted.

(h) Omitted.

(i) The proceedings against relator were not conducted according to the settled course of judicial proceedings as established by the law of Pennsylvania.

(j) The criminal prosecution of relator was not according to the established modes of procedure in Pennsylvania.

(k) The procedure adopted by the Court was in violation of Article I, Section 9 of the Constitution of Pennsylvania, prohibiting conviction, except by judgment of defendant's peers or the law of the land.

(l) Omitted.

(m) The proceedings were in violation of the Act of March 31, 1860, Section 25 of the statutes of Pennsylvania P. L. 427, prohibiting the trial of more than one indictment in felonies.

(n) The said Court by proceeding as herein set forth, lost its jurisdiction and its judgment and sentence are wholly void.

RULINGS MADE

The lower court sustained the relator's claims and discharged him (R. 332-340).

(3) The jurisdiction of this Court on appeal is invoked under Section 238 of the Judicial Code as amended, Act of Congress Jan. 28, 1915, C. 22, Sec. 2, 38 Stat. 803, Comp. Stat. Sec. 1215.

> "Appeals and writs of error may be taken from the district courts * * * direct to the Supreme Court in the following cases: * * * in any case that involves the construction or application of the Constitution of the United States * * *."
>
> *Moore vs. Dempsey,* 261 U. S., 86.

III.

Statement of the Case.

At the time of the trial Joe Valotta had lived in this country for twenty-two years. He had been working in the railroad shops of the Pennsylvania Railroad, North Side, Pittsburgh, for seven years (R-140). He had never had any trouble and had a good reputation among former employers and neighbors (R., 165-181). In the summer of 1922 the railroad union called a shopmen's strike. Valotta did not go out with the strikers. The usual incidents of such a strike occurred. City and state police were on guard. The shops were picketed by strikers. Assaults were made on workers. For a part of the time they were escorted from their homes to their work and back by policemen (R., 144, 158, 163). Valotta having been personally threatened and having heard that a brother workman had his eye gouged out by a striker, purchased a revolver from a uniformed police officer for his protection (R., 140, 141, 145). His home was immediately behind the shops. From the first of August until the thirtieth of October Valotta at the close of his work ran to his home and did not leave it until he came to work the next morning (R., 145). He was afraid of assault. On Sunday, October 29, the situation had quieted down to the extent that he felt he could risk going out in the evening to visit a friend. He took the gun with him. Valotta left the home of his friend about eleven o'clock to go to a christening (R., 97) and was returning home at one o'clock Monday morning.

His route lay through Freedmore Street. Freedmore Street is one block long, running between Irwin Ave. and Brighton Road, which is intersected by an alley, and an electric light was over the street at the

intersection. The night was so dark that at a distance of ten or fifteen feet one could not recognize a friend (R., 49). The streets were deserted.

When about fifteen feet from the corner of Freedmore and Irwin, Valotta saw four men standing on the corner. Three of these men, including Hopkins, (according to the testimony of the two survivors), had been drinking white mule and beer continuously for some hours (R., 42, 34). The fourth man had just joined them. (The group had been disorderly and awakened neighbors, which accounts for two of the neighbors who testified to looking out of the window.) Valotta and Palermo walked out around the curb, keeping in the highway outside of the curb. As Valotta passed, Hopkins, a striker and one of the group, made a reference to Valotta as a guinea scab and came at him in a threatening manner, stating that he would kill him (R., 142).

Valotta backed up against the wall of a house and as Hopkins came on with threatening gestures, he fired one shot at him when he was about six or eight feet away. Valotta and Palermo then turned and ran away. Valotta has been convicted of murder in the second degree for this killing. Officer Couch, who, up to this point was not present, was coming along Irwin Avenue and had almost reached the corner of Freedmore Street, heard the shot and ran around the corner. Two of Hopkins' companions, Brady and Rodgers, started in pursuit of Valotta. Conoran remained on the corner. Officer Couch shouldered his way past Brady and Rodgers (R., 34), joining in the pursuit when Valotta had a lead of about twenty feet. The pursuit continued ninety to one hundred feet and before Valotta had reached McCullough Alley the officer had gained on Valotta until he was about ten feet from him (R., 34). Valotta was running on the side-

walk with the buildings to his left. Couch was outside of the curb and a little behind Valotta. During all this time Valotta had his back to his pursuers and had no knowledge of any officer being in the neighborhood and knew only of the companions of Hopkins as his pursuers. Hearing the footsteps of one pursuer almost upon him, and fearing for his life, he turned halfway around and fired four shots as rapidly as he could pull the trigger (R., 51). These shots were fired when Couch was almost upon him and he could not miss. The first shot hit Officer Couch when he was in an upright position as shown by the course of the bullet, which struck him on the left side of the abdomen and traveled through his body horizontally. The second shot struck Officer Couch when he was in a crouching position, as shown by the fact that it struck him near the navel and took a downward course through his abdomen. The third shot struck him when he had gotten down so low that the top of his right shoulder was lower than his right shoulder blade, for the bullet went over the shoulder and went under the shoulderblade. The fourth shot was evidently fired when Couch in a low crouching position was just about seizing Valotta, for the bullet struck him on the side of the jaw, traveling through it horizontally and there was on his jaw a powder mark four inches in diameter (R., 19).

The Commonwealth called six eye-witnesses of the shooting. Four of them, Brady, Rodgers, Conoran and Palermo, were on the street at the time, Brady, Conoran and Rodgers being companions of Hopkins and Palermo a companion of Valotta.

Three of these men did not know that Couch was an officer until after the last shot was fired. One of them, Brady, recognized him as he brushed by his shoulder on the corner of Freedmore and Irwin. Two

witnesses were looking out of bedroom windows. Richard Porter, who lived on Brighton Road opposite the end of Freedmore Street, did not see Valotta at all, seeing only the flash of his gun. He saw a reflection from the brass buttons of the approaching officer which made him think he was an officer and afterwards he went down and examined the body and confirmed the impression. The other witness, A. Musher, was looking out of a third story window on Irwin Avenue opposite the dead end of Freedmore Street and when the officer came around the corner and joined in the pursuit, the officer's figure was outlined against the pavement as he approached the electric light on McCullough Alley and he recognized him as an officer.

All the testimony agrees that the night was dark, that there was a smoke laden fog and on the street people could not be recognized at any distance. The testimony in conjunction with the course of the bullet wounds shows conclusively that when Valotta half turned, Couch ducked low and ran in on him and that the interval between Valotta's first shot and his last shot could not have been more than a second or two, the time required for Couch to advance ten or fifteen feet.

Like three of the four other men with him on the street at the time, Valotta did not know Couch was an officer until he went down after the fourth shot. He then saw the officer's cap (R., 151). He fled to his home, asked his brother to take care of his family (R., 130), wandered around for a few days and was finally arrested.

When arrested he did not deny the shooting, told the policemen where he had thrown the revolver and when taken by the officers to the scene of the killing, pointed out the various places connected with the homicides.

Two indictments charging murder were found against Valotta, the one for the killing of Couch and the other for the killing of Hopkins, the former being No. 17 and the latter No. 19 February Sessions, 1923. Each indictment contained a count for murder and for voluntary manslaughter. The prisoner was arraigned on one indictment and pleading not guilty, was immediately arraigned on the other and issue joined. Valotta being without money, the court appointed a counsel to defend him, under the provisions of the Act of March 22, 1907, P. L. 31. The cases were called for trial on March 12, 1923. The docket entries of the cases were written up as though they were separately tried. The record at each number shows the convening of the court, the arraignment, the plea, the joinder of issue, the reading of the indictment, the instructions of the Clerk to the jury, the list of jurors challenged, the jury made up and sworn, the list of witnesses for the Commonwealth and for the defendant and the verdict of the jury. As a matter of fact the cases were called by the District Attorney before the same jury at the same time, all the testimony of the Commonwealth as to both homicides being offered, and when completed the Commonwealth rested.

The verdict of murder in the first degree was returned by the jury for the killing of Couch and the verdict of murder in the second degree for the killing of Hopkins. The Court charged the jury with relation to both indictments, submitting to them the possibility of eight several verdicts, namely, murder in the first degree, murder in the second degree, voluntary manslaughter or not guilty in each case, the jury being instructed to find a separate verdict in each.

The record does not disclose, nor does it appear that there was any offer by the Commonwealth or any order of the court to consolidate the indictments; any

consideration by the court as to the right or propriety of trying the cases together; any exercise of discretion by the court in relation thereto; any putting of the Commonwealth to an election as to which case it would try; any suggestion to the defendant as to his right to separate trials; any consent on behalf of the defendant or his counsel to a joint trial on the two indictments; or any notice to the defendant of his right to twenty peremptory challenges under each indictment.

After the verdicts, the question of the legality of a single trial on the two indictments was raised by defendant in his fourteenth reason for a new trial, which was refused. The Supreme Court of Pennsylvania dismissed the appeal and refused to hear a petition for reargument.

The writ of *habeas corpus* was then issued upon petition of relator, and after hearing the prisoner was ordered discharged.

IV.

Summary of Argument.

(1) Verdict, judgment and sentence in the state court are void by loss of Jurisdiction.

(A) Because the relator was deprived of substantial rights assured to him by the Constitution, and statutes of the state and was not tried in accordance with the established procedure in the state in the following respects:

(a) The Supreme Court of the State having ruled that the two indictments charged two separate and distinct offenses, he had a right to separate trials thereon.

(b) Relator was deprived of his right to twenty peremptory challenges under each indictment.

(c) He was deprived of his rights under the Act of Assembly of the Commonwealth of Pennsylvania, March 15, 1911, P. L. 20, providing that a defendant charged with any crime shall not be required to answer any question tending to show that he has committed or been charged with * * * any offense other than the one wherewith he shall then be charged.

(d) The procedure followed deprived relator of "trial by an impartial jury," guaranteed by the State Constitution Art. I, Sec. 9.

(B) Will the Constitutional guarantee of due process of law sustain a procedure under which the District Attorney in his sole discretion may join two or more indictments for murder for one trial, the defendant having no right to object and the court having no function to perform?

V.

Argument.

(1) THE VERDICT, JUDGMENT AND SENTENCE IN THE STATE COURT ARE VOID BY LOSS OF JURISDICTION.

(A) Because the relator was deprived of substantial rights assured to him by the Constitution, and statutes of the state and was not tried in accordance with the established proceedure in the State of Pennsylvania.

The Supreme Court of Pennsylvania (R., 344) in deciding against the question of double jeopardy, said that the offenses charged in the indictments were separate and distinct acts and not one offense.

SOURCES OF PENNSYLVANIA LAW.

The legal history of Pennsylvania begins with the charter granted to William Penn March 4, 1682. This charter granted practically sovereign powers in the making and execution of law. We quote a few sentences (Charter of Wm. Penn, p. 83):

> "Doe grant free, full and absolute power, by vertue of these presents to him and his heires, and to his and their Deputies and Lieutenants, for the good and happy government of the said Countrey, to ordeyne, make, enact and under his and their Seales to publish any Laws whatsoever, for the raising of money for the publick use of the said province, or for any other End apperteyning either unto the publick state, peace or safety of the said Countrey, or unto the private utility of perticular persons, according unto their best discretions, by and with the advice, assent and approbacon of the freemen of the said Coun-

trey, or the greater parte of them, or of their Delegates or Deputies, whom for the Enacting of the said Lawes, when, and as often as need shall require.

* * * * * * * *

* * * doe all and every other thing and things which unto the complete establishment of Justice unto Courts and Tribunals, formes of Judicature and manner of proceedings doe belong, altho' in these presents expresse mencon be not made thereof; and by Judges by them delegated to award processe, hold please and determine in all the said Courts and Tribunals, all accons, Suits and Causes whatsoever, as well Criminall as Civill, personal, reall and mixt;"

The only restriction was that the laws in question should not be repugnant to the laws of England and that there should be appeal to the King. Beginning with this charter there follows a series of laws first propounded by William Penn himself and subsequently enacted from time to time by the Colonial Assembly. During the eighty-five years between the granting of this charter and the Declaration of Independence in 1776, there had grown up a body of Pennsylvania law. The statutes we still have. The practice established by procedure and decisions of the Courts we do not have in full, the first published reports of Pennsylvania beginning with 1 Dallas in 1754. A case by case examination of all Pennsylvania reports in Dallas from 1754 to 1791 discloses that every indictment quoted in the reports was for a single alleged act. Justice Chase in *United States vs. Worrall,* 2 Dallas, 384, says:

"Each colony judged for itself what parts of the common law were applicable to its new con-

dition and in various modes, by legislative acts, by judicial decisions or by constant usage adopted some parts and rejected others."

The early Colonial Acts frequently recite that they are passed to clear up questions of usage which had developed in the Colonial Courts.

The first body of law propounded in 1682 established courts, provided for criminal procedure, and contains the following provision:

Charter to Wm. Penn, Chap. LXIX (Page 129):

"And that all possible Care and tenderness may be showen about the life of men, and to prevent Corruption, * * * *By the authority aforesaid, Be it Enacted,* That in all Causes Capital, and Criminal, the freemen of the County shall be summoned by the Sheriffs, and the names of the freemen shall be writ in small pieces of paper, and put into a hat and shaken; forty-eight of whom shall be drawn by a Child, and those so drawn, shall stand for the Sheriffs Returns; and the first twelve, not reasonably excepted against, shall Stand and Serve for the tryal (viz. chap. 38)."

In *Res Publica vs. Roberts,* 2 Dallas, 124 (1791), there came before the Supreme Court the question arising upon an indictment for adultery. The Court rests its decision on the practice developed in the Colony of Pennsylvania. The report uses the following language:

"The Court, after consideration, delivered the unanimous opinion that under the Act of Assembly and *the uniform practice of eighty-five years* (a practice which though it does not make

the law, must be strong evidence of what the law is) the indictment could not be supported, etc."

This early opinion establishes the fact that the fathers recognized the development of a distinctive Pennsylvania practice resting on usage before the Revolution.

In order, therefore, to ascertain the practice in criminal trials as affecting the trial of two separate indictments for two separate and distinct murders before one jury, at the same time, we must examine the common law of England as it existed in Colonial times, and we must trace the development of that law to the established practice of Pennsylvania, where in many respects it was modified in various regards, in each of the several American Colonies.

There is no English statute on this question which has any validity in Pennsylvania. (The first official published reports of judicial decisions in England begin in 1765.)

From an examination of the English Reports we can obtain a general view of the English law, and the manner and the extent to which that was adopted in Pennsylvania must be ascertained by the inspection of judicial decisions, acts of Legislature and testimony as to practice.

From this investigation it appears that under the common law of England in the Eighteenth Century, the trial of two several and distinct indictments before the same jury was unknown. In the drafting of indictments it was permissible, in the case of misdemeanors, to include in the same indictment separate and distinct counts, and these counts might be either for the purpose of charging different aspects of the

same transaction, (such as larceny and receiving stolen goods), or for the purpose of charging a *misdemeanor* in relation to several distinct transaction or acts, the Court, however at the trial, exercising its right and duty either to quash the indictment or to put the Crown upon its election which one it should try, in order that the prisoner might not be confounded in his defense and the jury distracted.

In cases of felony, the rule was much more strict. It was permissible to charge in one indictment several separate and distinct counts for felony, provided they were simply different legal phases of the same act or transaction. In cases where an indictment by various counts included charges of separate and distinct felonies, it was the duty of the Court to quash the indictment or to put the Crown upon its election which case it should try. This is sometimes referred to as a matter of judicial discretion, but that only means there was no statute. It was a firmly established practice, and the duty rested on the Court to apply the rule, where the facts were within its terms. In case it appeared either before the beginning of the trial or after the trial had progressed, that there were several and distinct charges and that, therefore, the prisoner might be confounded in his defense or prejudiced in his trial before the jury or injured in his right of challenge, then it became the duty of the Court either to quash or to put the Crown to its election.

The distinction between the practice in *misdemeanors* and in *felonies* is sustained partly on the ground of the more trivial nature of the punishment in the case of misdemeanors, and partly on the ground that under the common law there was no right of peremptory challenge in the case of misdemeanors.

The courts sustained the distinction between the practice in misdemeanors and in felonies in part on the ground that a man might well be willing to have a particular juryman sit upon the trial of a particular felony, and yet be very averse to him in the trial of another one joined in the same indictment. The application of this reason is very obvious in the case at bar.

Union labor would desire vengeance for the killing of Hopkins, jurymen in sympathy with the Police Department would desire vengeance for the killing of Couch, but union labor might well be reconciled to the killing of a strike-breaking policeman and friends of the police might well sympathize with one of the men the policeman was endeavoring to protect.

As has been stated, we do not have the complete reports of the Colonial Courts. We do, however, have the early decisions of our own courts since 1754 and the acts of the Legislature, both of which establish beyond all question that in Pennsylvania there has never been any other rule than this, namely, that a prisoner should not be tried at the same time, before the same jury, upon two felonies separate and distinct, and that even in the case of misdemeanors, this practice was of such doubtful validity that it has not been considered sound unless authorized by special Act of Legislature.

It was the rule at common law that a prisoner accused of felony should not be allowed counsel upon his trial upon the general issue "unless some point of law shall arise proper to be debated," so that the judge became in effect counsel for the prisoner. *Blackstone,* Vol. 4, Sec. 355. There was no statute regulating procedure, and consequently it was evolved

by practice. This practice, however, had the authority of law and it is repeatedly said that in such cases it was the duty of the Court to protect the prisoner where it appeared that separate counts in the indictment amounted, in fact, not to several aspects of the same act, but to a charge of separate and distinct crimes. The fact seems to be that the multiplicity of counts describing in various ways the same act, arose from the ingenuity of Crown counsel to overcome the astuteness of the Court in throwing out indictments for technical reasons. This old practice was abolished in the colonies by express provision of law, the Constitution of Pennsylvania providing, Article 1, Sec. 9, that "in all criminal prosecutions the accused hath a right to be heard by himself and his counsel."

Counsel for appellant comments on the fact that the right to separate indictment is not referred to in Magna Charta. This may well be, because indictments were not in the practice in 1215. They came in toward the close of the Thirteenth Century.

CONSTITUTIONAL PROVISIONS.

The Constitution of Pennsylvania contains the following provisions:

Article 1, Sec. 6. "Trial by jury shall be as heretofore and the right thereof remain inviolate."

The effect of this provision of the Constitution is well set forth by the Supreme Court of Pennsylvania in the case of *Byers vs. Davis*, 42 Pa., 89, on page 94.

> "The founders of this state brought with them to their new abode the usages to which they had been accustomed in the land from which they emigrated. Among them was trial by jury. That mode of trial had long been considered the right

of every Englishman, and it had come to be regarded as a right too sacred to be surrendered or taken away. Even in England it was fundamental or constitutional, so far as any right can be where there is no written frame of government. Its extent and its privileges, how and when it was to be enjoyed, were perfectly understood and in bringing it with them the founders of the Commonwealth doubtless intended to bring it as they had enjoyed it. None of the frames of government or constitutions under which we have lived have contemplated any extension of the right beyond the limits within which it had been enjoyed previous to the settlement of the state or the adoption of the constitution. No intention to enlarge it appears in the laws agreed upon in England in 1682. Our first constitution, that of 1776, declared that 'trials by jury shall be *as heretofore.*' The Constitution of 1790, and the amended one of 1838, adopted substantially the same provision. Their language was, 'trial by jury shall be *as heretofore,* and the right thereof remain inviolate.' All looked to preservation, not extension. It is the old right, whatever it was, the one previously enjoyed, that must remain inviolable, alike in its mode of enjoyment and in its extent."

Article 1, Sec. 9 of the Constitution of Pennsylvania is as follows:

"In all criminal prosecutions the accused hath a right to be heard by himself, and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecution by indictment or information, a speedy public trial by

an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land."

THE COMMON LAW.

It follows that the right of trial by jury as secured and defined by the common law of England and as developed in Colonial practice is and remains the law of the land in Pennsylvania and cannot be changed excepting by statute, and then only by statute which is not in derogation of the right.

What then was the common law as affecting the question involved here?

In reading the multitude of cases on this subject, it is necessary, in order to avoid confusion, constantly to keep in mind certain distinctions:

(1). The distinction between misdemeanors and felonies.

(2). The distinction between misdemeanors and felonies in separate counts in one indictment or separate indictments which simply present different legal aspects of the same act or transaction, or cognate offenses or offenses corollary thereto; and separate counts or separate indictments which severally refer to separate and distinct acts and transactions.

(3). The trial before the same jury consecutively and the trial before the same jury simultaneously.

We make this statement of caution for the reason that many general statements have been made which, on the surface, appear contradictory, but this contra-

diction disappears when the distinctions above stated are kept in mind.

The rule is thus stated by Chief Justice Fuller in *U. S. vs. McMahon,* 164 U. S., Page 76:

> Ch. J. Fuller. "In cases of felony the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defence, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offense or to restrict the evidence to one transaction."

This rule is also laid down in an early New Hampshire case, *State vs. Nelson,* 8 N. H. Reports, page 163, as follows:

> "No court ever permits a prisoner to be tried for two distinct and separate crimes upon one indictment, because by such a course he might be confounded in his defense and the minds of the jurors distracted. 3 D. & E., 98, *Young vs. The King."*

We quote from the case referred to as follows: *Young vs. King,* 3 D. & E., 98 (1789).

> "In *misdemeanors* the case in Burrow shows that it is no objection to an indictment that it contains several charges. The case of *felonies* admits of a different consideration; but even such cases it is no objection in this stage of the prosecution. On the face of an indictment every count imports to be for a different offense, and is charged as at different times. And it does not appear on the record whether the offences are or are not different. But if it appear before the

defendant has pleaded, or the jury charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defense, or prejudice him in his challenge of the jury; for he might object to a juryman's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge, who tries the prisoner, does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed."

The discretion referred to above is discretion to quash or put the Crown to its election—not to disregard the rule.

The same rule is sustained in *Regina vs. Giddins,* Car. & Mar., page 634.

This was a case in which the defendant was charged with assaulting and robbing two men who were walking together at the time of the assault. The indictment contained only one count and a motion was made to put the prosecution on election under which to proceed. The Court said, Tindal, C. J.:

"I think that the counsel for the prosecution is not to be put to elect. It is all one act and one entire transaction; the two prosecutors were assaulted and robbed at one and the same time; and there was no interval of time between the assaulting and robbing of the one and the assaulting and robbing of the other. If there had been, the felonies would have been distinct; but that is not so in the present case."

The *Earl of Halsbury's Laws of England,* Vol. 9, page 342.

"At common law there was no legal objection to several different felonies being charged in different counts in one indictment, but it is a well established rule of practice that, if different felonies, not being different ways of describing the same act, are charged in separate counts of one indictment, the judge will put the prosecutor to his election to proceed and offer evidence on one charge only."

Citing:

Castro vs. Rex, 6 App. Cas., 229 (242);
Young vs. Rex, 3 T. R., 98 (106);
Rex vs. Heywood, Le. & Ca., 451, etc.

Wharton's Cr. Proc. Sec. 344, holds, after discussion the following conclusions:

"1. Cognate offenses may be joined in separate counts in the same indictment.

2. If this is done in such a way as to oppress the defendant, the remedy is to quash.

3. It is permissible, in most states, to join several distinct offenses, to each of which fine or imprisonment is attachable; and upon a conviction on each count, to impose a sentence on each.

4. Yet as to offenses of high grade in all states, and in some states as to all offenses, the court will not permit more than a single issue to go to the jury, and hence will require an election at the close of the prosecution's case, except in those cases in which offenses are so blended that it is eminently for the jury to determine which count it is that the evidence fits.

The object of the rule, it may be added, is, first, to enable the defendant to prepare properly

for his defense; and, secondly, to protect him, by an individualization of the issue, in case a second prosecution is brought against him."

Joyce on Indictments, Sec. 394:

"The common law rule is that if an indictment contains charges distinct in themselves and growing out of separate transactions, the prosecution may be made to elect and the court may quash. But when it appears that the several counts relate to one transaction, varied simply to meet the probable proofs the court will neither quash nor enforce an election. And in this connection it is said that the effect of a union on the same indictment of several counts for distinct offences is different, when such distinct offences grow out of the same transaction, and when such offences had no connection with each other. * * * In the second class of cases it is the duty of the presiding judge, *without waiting for a motion to* that end from the defendant, to order the prosecuting officer to elect upon what charge he will continue the trial."

Enc. of Pleading & Practice, 19, P. 532:

"A defendant should not be tried on two different indictments at the same time, nor should two cases of misdemeanor be tried before the same jury and submitted together."

Rex vs. Clendon, Strange 870. (George II R.):

"Indictment setting forth that the defendant made an assault upon Sarah the wife of William Bestniff, and Elizabeth Cooper, and did them beat, wound and evil entreat. After verdict *pro Rege,* it was moved in arrest of judgment that these were two distinct offences, and therefore could

not be laid in the same indictment; and of that opinion was the court, and the judgment was arrested."

People vs. Howell, 4 Johns, 296 (N. Y. 1809):

Kent, Ch. J. * * * In all cases at least where the *right of peremptory challenge does not exist,* and two persons are indicted jointly, they may be tried jointly or separately at the discretion of the court. This is the settled practice, both here and in England, and no objection to it exists sufficient to outweigh the public convenience of the rule."

DEVELOPMENT OF PENNSYLVANIA LAW.

The indictment is the pleading upon which the accused is tried. Upon a plea of not guilty it becomes the issue. In the general case it is not contemplated that he shall be tried upon more than one indictment. The restrictions, therefore, which are imposed upon the joining of several counts in one indictment apply with still greater force to the consolidation of two indictments for purposes of trial, which was unknown to the Common Law. The legislature of Pennsylvania has consistently recognized the rigor of the common law in regard to the joinder of counts in one indictment. From time to time statutes have been passed permitting such a joinder in specific cases. These statutes carry with them the necessary implication that where no such modification of the common law has been enacted by the legislature, the common law itself is still in force. We direct the attention of the Court to these statutes. Pennsylvania has no statute authorizing the consolidation of indictments.

The Act of March 31, 1860, P. L. 427, was in effect a code of criminal procedure. We quote the provisions of this act so far as they relate to the point under discussion:

Section 79:

"The District Attorney may charge wilful and involuntary manslaughter in the same indictment, in which case the jury may acquit the party of one and find him or her guilty of the other charge."

Section 19:

"In every indictment for feloniously stealing property, it shall be lawful to add a count for feloniously receiving said property."

Section 28:

"It shall be lawful in cases of embezzlement by clerks, servants or other persons in the employ of another to charge in the indictment and proceed against the offender for any distinct acts of embezzlement not exceeding three, which may have been committed by him against the same master or employer within the space of six calendar months from the first to the last of such acts."

But note that the law as to felonies is vigorously restated.

Section 25 of the same Act provides:

"In all cases of felony the prisoner shall be arraigned and where any person on being so arraigned shall plead not guilty, every such person shall be deemed and taken to put himself upon the inquest or country for trial, without any question being asked of him how he will be tried, and the inquest shall be charged only to inquire whether he

be guilty or not guilty of the crime charged against him, *and no more.*"

WITH RESPECT TO PROCEEDURE.

Section 1 of the Act of July 9, 1901, P. L. 629, provides:

> "In the trial of misdemeanors and felonies, triable exclusively in the courts of oyer and terminer and general jail delivery, the Commonwealth and the defendant shall each be entitled to twenty peremptory challenges."

Section 40 of the Act of March 31, 1860, provides:

> "In all cases in which two or more persons are jointly indicted for any offense, it shall be in the discretion of the court to try them jointly or severally, *except that in cases of felonious homicide,* the parties charged shall have the right to demand separate trials, and in all cases of joint trials the accused shall have the right to the same number of peremptory challenges to which either would be entitled if separately tried, and no more."

It will be observed that Section 79 and Section 18 refer only to the charging of the same offense in two forms, Section 28 expressly permits the joining of counts setting forth several different acts of embezzlement, provided they do not exceed three, and have been committed against the same employer within the space of six calendar months.

The purpose of Section 28 is clearly shown in the Report of the Commission which drew the Act, from which we quote:

Report on *Penal Code 43.* See note in *Purdon,* Vol. 1, page 1036:

"This section is new and is intended to remedy difficulties arising from the common-law doctrines in relation to the joinder of offenses and joint offenders. At common-law, a felony and a misdemeanor, such as burglary and receiving stolen goods, could not be regularly joined: in larceny, counts for receiving were sometimes added, but the practice was regarded as of doubtful legality, until in the cases of *Rex vs. Galloway,* 1 Mood. Cr. Cas., 234, 1829, and of *Rex. vs. Madden,* 1 Mood Cr. Cas. 277, 1830, it was decided to be erroneous. In Pennsylvania the uniform practice has been to unite counts for larceny and receiving, *but in no other kinds of felonious taking has such joinder been permitted.* So at common law, if two persons are charged with jointly receiving stolen goods, a joint act of receiving must be proved; proof that one received in the absence of the other, and afterwards delivered to him, will not suffice: *Rex vs. Messingham,* 1 Mood. Cr. Cas., 257, 1830. The proposed section will obviate these technical difficulties, as it permits a count for receiving to be joined in all indictments for felonious taking, and authorizes the conviction of one or more of several persons, jointly indicted, for felonious taking or receiving, either as principals or receivers according to their actual guilt; Report on the Penal Code, 43."

Judge Agnew in the case of *Henwood vs. Commonwealth,* 52 Pa., page 425, makes the following comment:

"The English rule against the joinder of a felony and a misdemeanor in the same indictment has been greatly modified by modern decisions. It would be going too far to say now that it exists in any case, except it is where the offences are re-

pugnant in their nature and legal incidents, and the trial and judgment so incongruous as to tend to deprive the defendant of some legal advantage; *Rex vs. Ferguson,* 29 Eng. Law and Equity, 536; *Buck vs. The State,* 2 Harris & Johnson, 426; *Harman vs. Commonwealth,* 12 S. & R., 69; *State vs. Hooker,* 17 Vermont, 658; *State vs. Boyer et al.,* 1 McMullen, 190; *Rex. vs. Galloway,* 1 Moody, C. C., 234; Whart. Am. C. L., Sec. 423.

Even in England at this day it is said the joinder of larceny and the receiving of stolen goods are not repugnant: *Whart. Am. C. L.,* Sec. 420; *Rex. vs. Galloway, supra.*

In the Criminal Procedure Act of 1860, Sec. 24, (*Purdon* 254, pl. 24), the joinder of counts for stealing and receiving stolen goods is expressly authorized. The revisors in their report (*Purdon,* 254, note a), say that this had been practiced in Pennsylvania, but the doubts thrown over the practice by the English cases lead them to report the section."

Section 25 expressly provides that upon arraignment, the prisoner having pleaded, shall be put upon the trial of the indictment upon which he was arraigned after he had pleaded not guilty "and no more." If these words "and no more" mean anything at all, they mean that the trial shall be limited to the indictment upon which the prisoner was arraigned. Section 40 of the Act, with reference to two or more persons jointly indicted for any offense, maintains the uniform policy of our law *in favorem vitae.* In other words, while in other cases the court may exercise a discretion to require joint defendants to be tried together, in homicide cases such discretion is not within the power of the court. The right of the prisoner to

defend his life is superior to the convenience of the criminal court and each prisoner may demand as a right a separate trial. The same care for the right of the accused appears in the Act of May 15, 1895, Section 1, P. L. 71. It provides as follows:

> "Arraignment of defendants in courts of oyer and terminer *except where the indictment charges murder* is hereby abolished and in all case triable in such courts of oyer and terminer *except where the charge is murder,* the defendant or defendants shall only be required to plead orally or by writing endorsed on the indictment."

It is clear beyond doubt that the procedure of arraignment, plea, issue and trial on a single issue in homicide cases is expressly retained and preserved.

We have been unable to find a single case either in Pennsylvania or in England where the trial of a prisoner upon two indictments for separate and distinct murders before the same jury, at the same time, has been sustained on the authority of the common law or by an appeal to it.

As stated above, the authorities assign two reasons for the right to separate trial in the case of felonies:

First, the prejudicial effect on the jury of cumulative evidence as to different crimes, and the other, the interference with the right of the prisoner to twenty peremptory challenges on each charge.

There will be no confusion in the reported cases if this fact be kept in mind, viz: AT COMMON LAW NO RIGHT OF PEREMPTORY CHALLENGE EXISTED IN MISDEMEANOR CASES.

The practice slowly grew up of permitting two misdemeanors to be joined in the same indictment, the

judge exercising a discretion for the protection of the prisoner, whether he should quash the indictment, compel the Crown to elect or permit the trial of the indictment. It was doubtful, however, whether two indictments charging separate misdemeanors might in the discretion of the Court be consolidated for trial before the same jury, and Chief Justice Gibson states in 1819 he is unable to find such a case. (*Withers vs. Com., infra.*) In every case the Court exercised a legal discretion and some connection between the two charges always appears. The prisoner at common law in such cases was not confounded in his challenges, because he had none. Such was the common law and the law of Pennsylvania until the Pennsylvania statutes, April 4, 1809, and March 29, 1813, authorized four peremptory challenges in misdemeanors. The effect of this right of challenge in misdemeanor cases must have caught the attention of the Pennsylvania Bar, because in 1818 in the case of *Withers vs. Commonwealth*, 5 S. & R., 59, two misdemeanor actions in separate indictments were, by order of the Court below, consolidated and tried by the same jury at the same time. The prisoner was allowed, however, the privilege of challenging four jurors on each indictment. Counsel for the defendant state in their argument before the Supreme Court that "the entry of the Order of the Court on the record was made expressly with the design of bringing the subject before this Court."

Chief Justice Gibson, in his opinion, recognized the rule that at common law such *misdemeanors* could have been tried together; that at common law *felonies* with the accompanying right of peremptory challenge could not be tried together. But, as he points out, inasmuch as the prisoner was carefully al-

lowed his statutory right of peremptory challenge on each indictment, there was no good reason, *the case being only a misdemeanor,* to depart from the common law rule which was the long established practice, inasmuch as in the case before him the two charges could have been included in one indictment. In other words, the effect of the statute authorizing peremptory challenges in misdemeanor cases was not held to change the common law with respect to the joinder of misdemeanor counts in the same indictment. We quote Judge Gibson's opinion.

Withers vs. Commonwealth, 5 S. & R., 59 (1819), Gibson, J.:

> "I have found no case exactly like the present; but there is a strong analogy between it and those in which several counts for separate and distinct offenses are included in the same indictment; for these are necessarily tried together; and in cases of *misdemeanor,* it has never been held, that separate offenses could not be joined. *As to felonies, a different rule prevails,* and the Court goes so far as to quash, where distinct offenses are charged; or, if no motion for that purpose be made in time, to compel the prosecutor to elect a particular offense, to which alone, the prisoner is held to answer. But in no case has such joinder been considered a cause of demurrer, or ground for a motion in arrest of judgment, but merely as a subject for the discretion of the Court, and therefore, not a matter in which error could be assigned in a Superior Court. The only solid reason for the distinction in regard to felonies, is, that the prisoner having a right to challenge peremptorily, may choose to have a particular juror to try one of the offenses, and yet be alto-

gether averse to him with regard to the other; and thus, if the Court did not interfere, he would in some measure lose the benefit of his right. With us, this reason applies also to misdemeanors—as a defendant may peremptorily challenge four jurors; but whether a Court would therefore quash an indictment comprising two or more *misdemeanors,* would, I apprehend, depend on a sound exercise of discretion, having regard to the particular circumstances of each case; the Court would take care that the right to challenge should be fully preserved, by allowing the defendant peremptory challenges for each offense, or by quashing the indictment, as might seem most expedient. In the present case, the prisoner *was allowed his challenges on each indictment,* and has therefore no ground for complaint. But had it been otherwise, *we could view these two charges only as if they had been included in the same indictment.* It would, therefore, seem that the Court by whom they were tried were the only judges of the proper exercise of their own discretion; and that an abuse of discretion, even if it existed, would not be the subject of error. The judgment in each case must be affirmed."

This case was followed by a proper case, that of *Commonwealth vs. Wheeler,* 75 Pa. Superior Court, 84 (1921). The Superior Court of Pennsylvania followed the common law principle as modified and above set forth, but it is to be noted that in its opinion on page 88, the Superior Court say that the indictment in question CHARGED ONLY MISDEMEANORS.

"These facts rendered the question whether these indictments, *which charged only misdemeanors,* should be tried together one to be determined

by the Court below in the exercise of his sound discretion; *Withers vs. Commonwealth,* 5 S. & R., 59; *Commonwealth vs. Hartman,* 31 Pa. Superior, 364."

The fundamental principle underlying the rule of law above developed has to do with the Contsitutional guarantee in the law of both England and the United States of an impartial jury. For the purpose of obtaining an impartial jury in felonies, the prisoner was assured two fundamental and inalienable rights.

First, the right of peremptory challenges—in a capital case twenty peremptory challenges.

Second. The right to keep from the jury any evidence not bearing directly upon the crime charged.

In *Young vs. The King,* 3 D. & E., 98, cited above, the Court expressly says that the prisoner "might object to a juryman trying one of the offenses though he might have no reason to do so in the other."

It is the settled law that the jury shall not be permitted to hear evidence tending to prejudice the prisoner unless the subject-matter of the evidence is inseparably connected with the crime charged. This is the settled law in Pennsylvania as it was and is the common law of England. The application of the rule is well illustrated in two cases in which Justice Agnew wrote the opinion.

In *Shaffner vs. Commonwealth,* 72 Pa., 60 (1872), defendant was tried on the crime of murder, having been charged with poisoning his wife. There was evidence of improper intimacy between the defendant and one Susan Sharlock. Evidence was admitted tending to show that Sharlock, husband of Susan, had also died of poisoning with exactly the same symptoms as

the prisoner's wife. Chief Justice Agnew reversed on the ground that this evidence was not admissible and said on page 65:

"It is a general rule that a distinct crime, unconnected with that laid in the indictment, cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt, on the ground, that having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof, in itself, of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly, if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief, that he might have committed the one with which he is charged; it therefore predisposes the mind of the juror to believe the prisoner guilty. To make one criminal act evidence of another, a connection between them must have existed *in the mind of the actor, linking them together for some purpose he intended to accomplish;* or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burthen a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not be received, unless the mind plainly perceives that the

commission of the one tends, by a visible connection, to prove the commission of the other by the prisoner. If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt."

The lines of distinction drawn by Judge Agnew is stated as follows on page 66:

"It is obvious that to connect together the deaths of Sharlock and Nancy and make the former bear upon the latter, they must have been both contemplated by the prisoner as parts of one plan in his mind, in which the taking of Sharlock's life was part of his purpose of taking the life of Nancy. He must, therefore, have contemplated the death of Nancy before taking the life of Sharlock."

In this case Judge Agnew excluded the evidence for the reason that the testimony did not come up to the measure of the rule.

In the case of *Brown vs. Commonwealth,* 76 Pa., 319, it appeared that two indictments were found against Joseph Brown, one for the murder of Daniel S. Kramer and the other for the murder of Annetta Kramer, his wife. He was first tried on the indictment for the murder of the husband and was found guilty of murder in the first degree and sentenced to be hung. This verdict was reversed on the ground that the Grand Jury had not been properly selected.

Subsequently the Commonwealth went to trial on the indictment for the killing of the wife. It ap-

peared that both husband and wife had been killed at their home and apparently by the same weapon, and that the object was robbery. The body of the husband was found about three hundred yards from the house. In the trial of the second indictment for the killing of the wife, evidence was introduced with relation to the finding of the body of the husband. Judge Agnew says, page 337:

> "That the commission of a distinct offense, even similar in character, cannot be given in evidence against the prisoner, was held in *Shaffner vs. Commonwealth,* decided in Harrisburg in 1872 (22 P. L. Smith, 60), but when two persons are murdered at the same time and place and under circumstances evidencing that both acts were committed by the same person or persons and were part of one and the same transaction or *res gestae* and tend to throw light on the motive and manner of the murder for which the prisoner is indicted, the case is different. The club found near to the husband being the probable instrument of the death also and the motive, to wit, robbery, being one and the same which led to the murder of both at the same time, being parts of the same *res gestae* they together tend to throw light on each other and there is no reason that the truth should be thrown out by excluding the evidence objected to."

It will be noted in passing that even in this case where the two victims were killed as part of one transaction with a single motive, namely, robbery, there was no attempt to try the cases together. It will also be noted that taking these two cases together, the rule laid down by Judge Agnew is that when evidence of one killing is to be admitted in the

trial of an indictment for another, it can be admitted only when it appears that the two killings were part of a common plan with a single motive or purpose *existing in the mind of the actor.*

The same rule is sustained in the following case:

Snyder vs. Commonwealth, 85 Pa., 519, 521.

"The plaintiff in error was indicted for murder. He was charged with the murder of an illegitimate child of his daughter. The daughter was a witness against her father. As we understand her testimony, she swore, at least in chief, to being present and hearing him commit an act which resulted in the death of her child. On the part of the defense it was claimed that this prosecution was a wicked scheme to ruin and destroy him; that the charge of murder was not at first made. To show this fact, and thus to cast discredit on the testimony of the daughter, the plaintiff in error gave in evidence two transcripts of complaints against him, made after the alleged killing of the child. One made by the daughter charging him with incestuous adultery with her; the other by a friend of her, using her as a witness; charging him with incestuous rape. We do not understand that the plaintiff in error affirmed or denied the truth of the facts averred in either of those complaints. His object in giving them in evidence was to show that she did not then charge him with murder, but with other and lesser offenses. By proving that those offenses only were then charged against him, he sought to impair the force of her testimony in regard to her knowledge of his having previously committed the murder now claimed.

As rebutting, the daughter was recalled and

permitted to testify, under exception, that the complaint charging the rape was true. We cannot see how this evidence was rebutting. It in no manner contradicted the fact that she did not then charge the crime of murder to have been committed by him. Its effect, however, was highly prejudicial to the accused. The indictment did not charge him with the commission of any rape. He was not being tried for such a crime. Without notice, or opportunity to prepare a defense against a charge of such an infamous crime, this evidence went to the jury. It was in manifest disregard of the rule of law that the evidence offered must correspond with the allegations, and be confined to the point in issue. Here he was on trial for the commission of one felony; but the Court admitted testimony of his having committed another felony of an entirely separate and distinct character. *The two could not have been joined in the same indictment.* In case the direct evidence of the homicide was not entirely satisfactory to the jury, yet they may readily have concluded, if he was such a monster as to have committed a rape on his own daughter, he had a heart sufficiently depraved to commit the murder charged against him. The evidence was not rebutting. He was denied that protection on his trial which the law gives to every person charged with the commission of crime."

See also *Goersen vs. Commonwealth,* 98 Pa., 388.

EVIDENCE AND CHALLENGES.

The preservation of the impartiality of the jury by the enforcement of this rule has been so highly regarded by the legislature of Pennsylvania that it passed the Act of March 15, 1911, P. L. 20, providing that "Hereafter any person charged with any crime and called as a witness in his own behalf shall not be asked, and if asked shall not be required to answer any question tending to show that he has committed or been charged with or been convicted of any offense other than the one wherewith he shall then be charged or tending to show that he has been of bad character or reputation, unless" (here follow exceptions not applicable to the facts in this case).

We next come to a deprivation of right of twenty challenges in each particular case. The record gives no information at all excepting the names of those challenged and this record is the same in the docket entries of each case.

The right of twenty peremptory challenges is expressly secured to the prisoner by the Act of July 9, 1901, P. L. 629, quoted above on page 25. Section 40 of the Act of March 31, 1860, quoted above, expressly provides that where defendants are tried jointly for felonious homicide, each defendant shall be entitled to twenty peremptory challenges and each defendant shall also have the right to a separate trial.

This right of peremptory challenge is as old as the English law and has always been held to be a substantial and inalienable right of the prisoner. It was a right belonging only to the prisoner and not to the Crown.

Blackstone, Vol. IV, page 353: (Lewis's Ed.)

"Challenges upon any of the foregoing accounts are styled challenges *for cause,* which may be without stint in both criminal and civil trials. But in criminal cases, or at least in capital ones, there is, *in favorem vitae,* allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous. This is grounded on two reasons: 1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment, to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside."

This right of challenge has always been one of the fundamental safeguards of the English law. It is held in the case of *Lewis vs. United States,* 146 U. S., 370, quoted on page 49, to be one of the substantial rights of the prisoner which cannot be waived, and this holding is simply a statement of the long estab-

lished rule in regard to right of challenge. It must, therefore, affirmatively appear upon the record that the prisoner had this right. If it does not so appear affirmatively, then he has not had due process of law. It makes no difference how many challenges were actually taken. The mere fact of the two cases being tried together would necessarily confuse and hinder the defendant in the exercise of his right of challenge. It is quite apparent that certain members of the panel might be prejudiced by the fact that a striking member of a labor union was killed, who would have no prejudice arising out of the killing of a policeman, and it is quite apparent that certain members of the panel might have a violent prejudice arising out of the killing of a policeman, who would have no such prejudice arising out of the killing of a union labor striker. The prisoner was entitled to secure an impartial jury in each case by exercising his right of peremptory challenge without regard to how the particular jurors selected might have had feelings prejudicial to impartiality in the trial of the other case.

We refer again to the case of *Withers vs. Commonwealth,* 5 S. & R., 59, see above page 30. In this case Chief Justice Gibson considered very carefully whether or not the statute giving the right of peremtory challenge in misdemeanors had not abrogated the old common law rule permitting the joining of distinct misdemeanors in several counts in one indictment. He finally sustained the court below in that case solely on the ground that the record affirmatively disclosed the preservation of the right of challenge in each case to the prisoner, that is to say, he had his full quota of challenges for each offense. If Chief Justice Gibson, after very deliberate consideration, sustained the trial because the offenses charged might

have been joined in separate counts under one indictment, solely on the ground stated above, how can it be argued in a case where life is at stake, that the humane principles and long established practice of the common law of Pennsylvania, which recognizes neither joinder of separate and distinct felonies in one indictment nor the consolidation of such separate indictments for trial, can be brushed aside in a case where the record is entirely silent on the question of the prisoner's undoubted right to twenty peremptory challenges in each case?

RECOGNITION OF RULE OUTSIDE OF PENNSYLVANIA.

The position taken here is sustained by the great weight of authority in the United States, and so far as we can ascertain, no modification of this view has ever been sustained by the reasoned opinion of any court, except where reliance is placed upon a statute. In fact the Congress of the United States has recognized the same principle because in order to secure the convenience of joining several offenses in one trial, it has had recourse to an express statute authorizing such a procedure. Such a statute would have been unnecessary had the common law permitted it.

We quote a few of the many cases from different states in the Union sustaining the position here taken.

Mayo vs. State, 30 Ala., 32. The defendant was charged under two counts and one indictment for the same offense, the counts being embezzlement and larceny from a storehouse. The Court said:

> "It is a practice sanctioned by common custom and by the law to charge a felony in different ways in different counts of the indictment, so as

to provide for the different phases which the evidence may present upon the trial; and where such is the bona fide purpose of the joinder, of counts, the court never exercises its power of quashing the indictment or compelling an election. *Baker vs. State,* 4 Ark., 56; *Cain vs. People,* 8 Wendell, 203; *Roscoe's Criminal Evidence,* 231, 232, Archb. Cr., P. L., 95, Note 1, Barb. Cr. Law, 340; *People vs. Rynders,* 12 Wend., 425; *State vs. Nelson,* H. & H., 163; *State vs. Coleman,* 5 Porter, 32. The principle to be extracted from these authorities is that the court shall always interpose either by quashing the instrument or by compelling an election where an attempt is made, as manifested by either the indictment or the evidence, to convict the accused of two or more offenses growing out of different and separate transactions; but should never interpose in either mode where the joinder is simply designed and calculated to adapt the pleading to the different aspects in which the evidence on the trial may present a single transaction."

McGehee vs. State, 58 Ala., 360—Stone 3:

"If it had been averred in this indictment that the two defendants had committed separate and distinct offenses, at different times—neither being present or participating in the offense of the other—a demurrer to the indictment would have lain, notwithstanding the two charges are identical in character. This, on the well defined ground, that on such trial, it would be necessary to offer proof of two independent transactions, thus producing inextricable confusion of the minds of the jurors."

State vs. Smith, 8 Blackford (Ind.) 488:

"If it appear that the four counts charged separate and distinct felonies and not one and the same felony in different modes, the Court below would have acted rightly in quashing the whole indictment."

Kane vs. The People, 8 Wend., 203 (N. Y.):

"In cases of felony where two or more distinct and separate offenses are contained in the same indictment, the Court in its discretion may quash the indictment or compel the prosecutor to elect upon which charge he will proceed."

People vs. Runders, 12 Wend., 425:

"That there would be an incongruity in incorporating in the same indictment offenses of a different character, such, for instance, as forgery and perjury, cannot be denied, and that in such a case the Court would refuse to hear a trial upon both there can be no doubt, but when offenses of the same character, differing only in degree are united in the same indictment, the prisoner may be and ought to be tried on both charges at the same time. Such is this case. The prisoner was indicted for forging the check and also for publishing it as true, knowing it to be false."

State vs. Nelson, New Hampshire Reports 8, page 163.

"No court ever permits a prisoner to be tried for two distinct and separate crimes upon one indictment, because by such a course he might be confounded in his defense and the minds of the jurors distracted. *Young vs. The King,* 3 D. & E., 98.

State vs. Flye, 26 Maine, 312.

"If the different counts are inserted in good faith for the purpose of meeting a single charge, the court will not ever compel the prosecutor to elect."

In the case of *Regina vs. Truman,* 8 Car. and P., 727, the prisoner was indicted on six counts, each charging him with setting fire to a separate house. It appeared that he had fired one house in a row, and all of the others had caught fire therefrom. It was moved that the prosecutor's counsel be put to his election which count he would go upon. Erskine, J., said:

"As it is all one transaction, we must hear the evidence. I do not see how in the present stage of the proceedings, I can call on the prosecutor to elect. I shall take care that as the case proceeds, the prisoner is not tried for more than one felony."

The Commonwealth vs. Sullivan, 104 Mass., 552. The defendant stole out of an express wagon a number of different packages belonging to different parties, stealing them all at the same time.

"The stealing at the same time and by one taking of several articles belonging to different persons, is larceny of the whole and of each article and may be indicted either in one aspect or the other, as one entire crime or as several distinct offenses."

Held that these cases could be tried together.

In *State vs. Henry,* 59 Iowa, 391, it was held that the forging and uttering of forged papers are two distinct offenses and cannot be charged in the same indictment. No objection was made at the trial and the question was raised for the first time before the Supreme Court. The Supreme Court said:

"In view of the fact that appellant's counsel may have waived rights upon which he may have insisted because of the ruling in *State vs. Nichols, supra,* we are of the opinion that the judgment of the court should be so far modified as to impose a sentence of four years only upon the first count of the indictment."

In *McClellan vs. State,* 32 Ark., 609, defendant was indicted for forgery and for uttering a forged instrument, on two separate indictments. He was tried on them together. The Court said:

"It was an irregularity, to say the least, to try the two indictments together. Such a practice would produce great confusion and uncertainty and should be condemned.

Judgment must be reversed and the cause remanded, with instructions to the court below to arrest the judgment and to hold the defendant in custody until the charges may be again inquired into and passed upon by the grand jury."

In *State vs. Devlin,* 25 Mo., 174, defendant was put on trial for assault and battery. After the evidence on both sides was closed, the Court refused to submit the case to the jury, as requested by defendant and against objection on his part to calling the next case on the docket, being case of misdemeanor, and impaneling the same jury, heard the evidence in the same and submitted both cases to the same jury at the same time. Held to be error. The Court said:

"This may be looked upon as a simple matter and that the irregularity might have done injury to either party, but it is, nevertheless, an irregularity which this court cannot allow. If we begin in this manner to sanction such a proceeding, we cannot tell when or where it may end.

It is the right of the accused to have his case tried by a jury free from an improper bias. This trial must be in its nature a single matter, and the court has no right to impose on the defendant and his counsel the necessity of waiting and listening to a different prosecution for a different offense."

The common law permitted the joinder of misdemeanors in separate counts for trial before one jury, the authorities giving as a resaon that in misdemeanors the defendant was not entitled to peremptory challenges, (See *4 Johns,* 296, *supra*), but this procedure was permitted only in the sound discretion of the court, and where in the exercise of that discretion the court was of the opinion that the prisoner would not be wronged, or in the old language, "the prisoner confounded in his defense and the jury distracted" by the cumulation of evidence. (See *Young vs. King,* 3 D. & E., 98, *supra.*)

Coming now to the case at bar, the Supreme Court in its opinion *In re Valotta,* 279 Pa., 84, in considering the question of double jeopardy, uses the following language, page 88:

"Where two persons are killed 'by separate shots or strokes, although in the same riot or affray, an acquittal or a conviction of one * * * homicide is no bar to an indictment for the other as they are distinct acts.' "

In other words, it holds that the offenses charged are separate and distinct.

The only discussing by the Supreme Court of the question now under consideration is as follows (page 88):

"The fifth attack made on the integrity of the

verdict is that it was improper to try the defendant upon the two indictments at the same time. *The record shows that he made no objection to be thus tried.* Assuming but not deciding that notwithstanding his failure to object on trial, he can now be heard to raise this question, the simultaneous trial on two indictments charging murder is warranted and the finding of guilty of second degree on one indictment does not affect the first degree conviction on the other. *Com. vs. Brown,* 264 Pa., 85."

But the Supreme Court does not discuss the question involved at all, but treats it as *Stare decisis* in the Brown case which it cites.

Turning to the case referred to, (*Brown vs. Commonwealth,* 264 Pa., 83), we find that the subject was not discussed at all. In that case the prisoner fired two shots through a closed door, killing two men. The question now under discussion was never raised at any point in the proceeding. It may be positively stated that the Supreme Court of Pennsylvania has never considered and ruled upon this question. In the first case it went by default and this case was used as authority for the ruling in the second case. After a very exhaustive search we find no other case in the books in Pennsylvania of a similar nature. *Brown vs. Commonwealth* also went up from Allegheny County.

WAIVER OR CONSENT.

It will be noted that the Supreme Court in the opinion above quoted, says:

> "The record shows that he made no objection to be thus tried."

An inspection of the record discloses that it is silent, on the matter of objection. It shows no consent. It does not show that the question was ever before the court. This language overlooks the well established rule that in criminal cases the fundamental rights of the prisoner may be lost neither by failure to object nor by actual consent.

In *Lewis vs. United States,* 146 U. S., 370, the Supreme Court by writ of error reviewed a judgment of the Circuit Court of the United States for the Western District of Arkansas, imposing a sentence of death. This case lays down several fundamental rules.

(1) A prisoner cannot waive his substantial rights incident to trial by jury.

(2) The right of challenge is a substantial right.

(3) It must appear affirmatively on the record that the prisoner enjoyed the rights guaranteed to him by the Constitution.

(4) The trial of the prisoner in a court of justice is not a private procedure, but the entire public is interested in the result. The case was reversed and a new trial ordered for sufficient reasons.

(5) It did not appear affirmatively on the record that the prisoner was personally present during all of the trial. The Supreme Court quotes with ap-

proval on pages 372 the case of *Prine vs. Commonwealth,* 18 Pa., 103-104.

"It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence. • • • And it appears to be well settled that, where the personal presence is necessary in point of law, the record must show the fact."

The Court held that this right could not be waived. Page 374:

"We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial."

And goes on to take the position that the legal procedure in criminal trials is a matter of public concern. We quote further from page 374:

Lewis vs. United States, 146 U. S., 370.

"The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, or by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by

law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods.' So, too, in the case of *Schwab vs. Berggren*, 143 U. S., 442, 448, this language of the court in *Hopt vs. Utah* is cited and approved."

In regard to the right of challenge being an essential right, the Court says on page 376:

"Thus reading the record, and holding as we do that making of challenge was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made, we are brought to the conclusion that the record discloses an error for which the judgment of the court must be reversed.

The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury. As was said by Blackstone, and repeated by Mr. Justice Story: 'In criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons: 1. As every one must be sensible, what sudden impression and unaccountable prejudices we are apt to

conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such his dislike. 2. Because upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.' 4 Bl. Com., 353; *United States vs. Marchant,* 4 Mason, 158, 160, 162; and 12 Wheat., 480, 482. See also, Co. Lit., 156b; *Termes de la Ley, voc.,* Challenge, 2 Hawk. c., 43, Sec. 4; *Regina vs. Frost,* 9 Car. & P., 129, 137; *Hartzell vs. Commonwealth,* 40 Penn. St., 462, 466; *State vs. Price,* 10 Rich. (Law), 351, 375."

WAIVER.

The rule so laid down in the United States Supreme Court in the above case of *Lewis vs. United States,* and which is sustained by Pennsylvania authority quoted in that opinion, has been fully sustained in Pennsylvania in cases where the Supreme Court gave careful consideration to this question. We quote:

Prine vs. Commonwealth, 18 Pa., 103.

"What authority had the prisoner's counsel in this instance, on the pretext of convenience, to waive their presence? In a criminal case, there is no warrant of attorney, actual or potential; for

when a prisoner binds himself by an agreement which he is competent to make, it is entered on the record as his immediate act; and this is a sufficient reason why he should be in Court to do those things which his counsel could not do for him. It is unnecessary, however, to speak of delegated authority; for the right of a prisoner to be present at his trial is inherent and inalienable."

Mills vs. Commonwealth, 13 Pa., 627.

"But it is contended, that the counsel of the prisoner consented to his being tried at this adjourned court of quarter sessions, and if they did, it ought not to weigh a feather in the scale of justice. *They* may have been ignorant of the law and of his rights, and therefore, made no objection. But it is not the consent of counsel which can constitute a tribunal by which a citizen may be tried and punished. It is the law of the land, and that alone, which can constitute and establish such a tribunal.

I need not repeat the authorities which establish that consent cannot give jurisdiction. In criminal proceedings especially, that axiom has grown with the growth and strengthened with the strength of the law. Trials by lynch law, might otherwise be valid; for, at times, I dare to say, a man might consent to their jurisdiction in hope or in fear, or perhaps in ignorance. But *autrefois acquit* or *autrefois convict* couldn't be pleaded in that case, nor in this; because it is a lawful trial only that can be effectually so pleaded. Some affidavit and some certificates of such consent were produced at bar, but the counsel for the defendant positively deny it on their affidavit. But we can regard neither the one nor the other; they are no part of the record, nor can they be made such.

But for myself, I think it a matter of no account, and if the prisoner had appeared in court, and under his sign manual, on the record, agreed to be then tried, it would not have the slightest influence with me. I look to the law of the land. Something was said of the enormity of the offense. The prisoner undoubtedly, if guilty (in relation to which it is not for me to express any opinion, as he will be tried again), not only violated the highest dictates of morality and good manners, but broke the law, and exhibited a most corrupt and indecent want of taste. But we look only to the record of the trial; it is our duty to see that it is right and lawful. Heeding neither the impulses of passion, nor tolerating the intrusion of prejudice; but in calm severity of judgment, we apply the rules of the criminal law to it. And by that test, we find it wanting. The trial was *Coram non judice,* and therefore null."

Consent cannot give jurisdiction, especially when this principle is appealed to in a case where there are no decisions supporting it.

The Act of Assembly of March 15, 1911, P. L. 20 (quoted *supra,* page 38) expressly provides that a prisoner shall not be asked, and if asked shall not be required to answer any question tending to show that he has committed or been charged with or been convicted of any offense other than the *one* wherewith he shall then be charged or tending to show that he has been of bad character or reputation. Owing to the fact that Valotta was tried on two indictments for two separate and distinct offenses before the same jury, he was in effect compelled to testify contrary to the provisions of this act. (See his direct testimony.

page (R. 140 *et seq.*) and cross-examination, page (R. 144 *et seq.*)

SUMMARY.

The Constitution of Pennsylvania guarantees to every citizen that the trial by jury, as heretofore, shall remain inviolate, that he shall have a trial before an impartial jury and can be condemned only by the judgment of his peers or the law of the land.

The trial by jury, as defined by the Constitution and the law of the land, as established in Pennsylvania, is the common law of England, excepting as modified by statute and long established practice.

Under the common law of England, felonies arising from distinct and independent transactions could not be joined in one indictment, nor could several indictments therefor be tried simultaneously before the same jury. The courts of Pennsylvania have always recognized this rule. The Legislature of Pennsylvania has recognized it by passing various statutes permitting some variation therefrom in lesser cases and absolutely prohibiting it in murder cases. There is no statute permitting consolidation of indictments and there is no practice in Pennsylvania, and there is no considered decision by any court in Pennsylvania holding contrary to the rule in question. The opinion of the Supreme Court in the case of Joseph Valotta is the first opinion written by any court in Pennsylvania holding to the contrary in a homicide case, and that opinion is not a considered opinion, but refers to a former case as authority, in which the question was neither raised, mentioned, discussed nor decided. We except, of course, the opinion of the trial court which briefly bases the trial of the indictments together on *Withers vs. Commonwealth,* 5 S. & R., 59 (R. 222),

the court failing to note that the case cited deals with misdemeanors and not with felonies and that it affirmatively appeared of record that the right of challenge was absolutely preserved therein.

What are the rights of the defendant upon a trial of an indictment upon which he is charged with murder in the Commonwealth of Pennsylvania?

The following propositions are clearly sustained by both law and practice:

(1) He is to be charged with one offense and no more.

(2) He is to be arraigned on a single indictment to which he pleads, and if pleading not guilty, the issue is joined and the trial is upon that indictment and no more.

(3) He is entitled to twenty peremptory challenges upon each indictment.

(4) No evidence can be admitted with respect to any other separate and distinct crime charged.

(5) He is entitled to a trial by an impartial jury, the impartiality to be secured under the safeguards of the law in regard to challenge, procedure, trial and evidence.

(6) He cannot be convicted unless the Commonwealth presents evidence sufficient to convince the jury of his guilt beyond a reasonable doubt.

(7) He is not permitted to waive any of the substantial rights guaranteed to him as above set forth.

(8) Upon appeal, every presumption is in favor of the prisoner. The record must affirmatively disclose every fact of evidence or procedure upon which the Commonwealth relies to sustain the conviction.

(9) There is neither any provision in law nor any practice in Pennsylvania for the consolidation of indictments of this class.

(10) By the provisions of Section 25 of the Act of March 31, 1860, the accused in a case of felony is to be tried upon the issue presented by that indictment and no more, and the trial of the accused on an additional indictment is *coram non judice.*

The Supreme Court of Pennsylvania sustains the verdict upon a statement of fact copied almost *verbatim* from the Commonwealth's printed brief (R. 313, 314) but the evidence of the Commonwealth itself flatly contradicts this statement. The state courts have entirely overlooked the rule laid down in *Hunter vs. Commonwealth*, 79 Pa., 503:

> "By the merciful provisions of our criminal law, the higher and more atrocious the crime, the more numerous are the safeguards thrown around the accused and the more jealously does the law guard every legal right to which he is entitled."

Therefore, by the consolidation of the indictments in this case or rather since there was no order of Court to that effect, by the arbitrary trying of them together without consolidation, Joseph Valotta was denied due process of law and equal protection of the laws in every one of the particulars stated above, each one of which is a substantial and inalienable right which the policy of the law gives to the accused, and which cannot be waived by him. Not only can no authority be found for the procedure referred to, but no established practice can be appealed to. There has never been any such practice. So that Valotta, in the trial of this case, has been convicted by an unusual and extraordinary proceduce and has not had the equal protection of the laws guaranteed to him by the Constitution. By

such procedure the jurisdiction of the state court was lost and the sentence thereunder and all proceedings thereafter became and are null and void.

In support of the position here taken upon the hearing of this writ, a number of distinguished lawyers of long experience in criminal practice in the State of Pennsylvania were called to testify as to the actual practice in their several jurisdictions. Their testimony covered practically the entire state (R., 250-292). The testimony of these gentlemen is clear, explicit and fully sustains every position taken in this brief.

DO THE FACTS IN THIS CASE SUSTAIN A FINDING OF LOSS OF JURISDICTION IN THE TRIAL COURT?

In preparing this brief counsel for appellee has just discovered an omission in the printed record. On page 9 appears docket entries marked "No. 17-19 February Sessions, 1923." Then follow the docket entries in the case at No. 17 (Couch case), the docket entries at No. 19 (Hopkins case) not being printed. As a matter of fact, there are complete docket entries in each case, the only difference being in the name of the deceased. The facts in regard to these entries, as they were submitted in evidence in the court below, are stated by Judge Thomson in his opinion (R., 326). This procedure is absolutely void under Section 25 of the Act of March 31, 1860, P. L. 427, quoted above on page 24.

Under this statute, after arraignment and plea, the jurisdiction of the court is expressly confined to trying the prisoner upon the charge set forth in the indictment "and no more." The trial of the second

indictment is *coram non judice.* It follows, therefore, that after arraignment and plea on the first indictment, the jurisdiction of the court was exhausted and when it proceeded instantly to arraignment and plea under the second indictment, it was proceeding without any jurisdiction.

There is nothing in the record to show under which indictment arraignment and plea first occurred. The docket entries in the two cases are absolutely identical and absolutely parallel excepting for the change in the deceased's name. For the purpose of maintaining the judgment in this case, all jurisdictional facts must affirmatively appear. The Court will not conclusively assume that either one of the indictments was first presented and there is, therefore, nothing on the record to sustain jurisdiction under the statute.

But apart from the order of presentation, there was no authority in the court under the statute to try the two cases together, particularly when the joint trial rests merely on the action of the District Attorney and without any action on the part, either of the court or of the defendant.

CHALLENGES.

The right of twenty peremptory challenges in each case is given defendant by Section 1 of the Act of July 9, 1911, P. L. 629, quoted on page 25.

Only twenty challenges were allowed (R., 301) but in this case the defendant could not take advantage of his right to challenge but was confounded therein. There is a feud between union workers and policemen. There is a feud between union workers

and so-called "scabs." Sympathizers with union labor would unquestionably desire to "get" Valotta for the killing of Hopkins. Sympathizers with members of the police force would undoubtedly desire to "get" him for killing Couch, while union labor might well look leniently on the killing of a hostile officer, and the officer's friends might well look leniently on the killing of a union man at a time when there was actual conflict between the two bodies. The clear purpose of peremptory challenge, therefore, was nullified by the joint trial and the Court was without jurisdiction to proceed in violation of the statute.

EVIDENCE.

The Act of March 15, 1911, P. L. 20, quoted on page 38, forbidding that the defendant be required to answer any question tending to show that he has committed or been charged with * * * any other offense, was in effect nullified. While technically the defendant was not required to go on the stand at all, nevertheless he either had to stay off the stand entirely, thereby subjecting himself to the necessary implications from such silence, or he had to go on the stand and testify in regard to the facts under both indictments, thereby subjecting himself to cross-examination, contrary to the purpose of the act. If the Hopkins case had been tried separately, it would not have been admissible in that case to prove the shooting of Couch, nor would the death of Hopkins have been provable in the Couch case.

We submit that the matters complained of are not mere errors of procedure but are denial of due process of law within the decisions of this court.

In *Ex parte Bane,* 121 U. S., 1, the prisoner was indicted for embezzlement under Federal statute. The indictment contained the words "with intent to deceive the controller of the currency, etc." At the trial the indictment was demurred to. The court struck from the indictment the words "the controller of the currency and" as being surplusage and not material and proceeded with the trial. The defendant was found guilty. Upon writ of *habeas corpus,* notwithstanding the merely technical character of the change, the Supreme Court held that the trial court had lost its jurisdiction. We quote from page 13:

> "It is of no avail under such circumstances to say that the Court still has jurisdiction of the person and of the crime; for, though it has possession of the person and would have jurisdiction of the crime if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment."

In *Ex parte Lange,* 85 U. S. (18 Wall), 163, the writ was directed to the marshal of the Southern District of New York. It appeared that the prisoner had been convicted and sentenced. Subsequently the court revoked the sentence and resentenced the prisoner. This court held that although the trial court had jurisdiction it had exhausted that jurisdiction by imposing the first sentence and it had no jurisdiction to impose the second sentence. The Court said on page 178:

> "There is no more sacred duty of a court than in a case properly before it to maintain unimpaired those securities for the personal right of the individual which has received for ages the sanction of the jurists and the statesmen; and in

such cases no narrow nor illiberal construction should be given to the words of the fundamental law in which they are embodied."

Ex parte Neilson, 131 U. S., 176. Neilson was convicted in the Territory of Utah for co-habiting with more than one woman, and sentenced. Thereafter he was indicted for adultery on the same subject-matter and convicted. The Supreme Court sustained the petition for habeas corpus. It was held that the trial court had jurisdiction of the case but had no jurisdiction to sentence a prisoner in violation of the Constitutional guarantees of the Fifth Amendment.

The case of *Hopt vs. Utah,* 110 U. S., 574, came before the Supreme Court on writ of error, but the language of the Court is broad enough to make it pertinent in this case. The defendant was charged with murder in the first degree. Under the statute of Utah the trial was by triers appointed by the Court; all challenge of proposed jurors in felony cases must be had in the presence as well of the court as of the accused. This court held that the presence of the accused could not be dispensed with. Justice Harlan says on page 579:

> "If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

In the case of *Frank vs. Mangum,* 237 U. S., 309, the prisoner was indicted for murder, tried and convicted and the conviction sustained by the Supreme Court of the state. On writ of *habeas corpus* to this court two questions were raised.

(a) A fair trial was not had by reason of mob disorder at the trial.

(2) The absence of the prisoner when the verdict came in.

There was no question that the trial court had complete jurisdiction upon the commencement of the trial and that the entire procedure was affirmed by the Supreme Court of the state. Nevertheless, this court regarded the two matters charged as proper grounds for considering the petition.

It refused to act upon the charge of public disorder because testimony had been taken on this matter before the Supreme Court and the record in regard thereto had not been remitted for review. This court says on page 336:

> "The mere assertion by the prisoner that the facts of the matter are other than the state court upon full investigation determined them to be will not be sufficient to raise an issue respecting the correctness of that determination; especially not where the very evidence upon which the determination was rested is withhold by him who attacks the finding."

On the second point the Court held that the absence of the prisoner at the time the jury came in had been waived and that under the well established practice of Georgia, the prisoner was permitted to waive his presence.

In this case, on page 326, this court holds that due process of law must include the following elements:

> "(a) A criminal prosecution in the courts of the state.

(b) Based upon a law not in itself repulsive to the Federal Constitution.

(c) Conducted according to the settled course of judicial proceedings as established by state law.

(d) There must be notice.

(e) There must be a hearing or an opportunity to be heard.

(f) It must be before a court of competent jurisdiction.

(g) It must be according to established modes of procedure."

(The lettering is ours.)

We particularly call attention to these two requisites:

"(c) Conducted according to the settled course of judicial proceedings as established by state law.

(g) It must be according to established modes of procedure."

If these issues properly rise upon a writ of *habeas corpus*, then the Federal Court must judicially determine them. In order judicially to determine them, it must make an inquiry and ascertain whether or not the requisites stated have been complied with. It is argued that a mere statement of the Supreme Court of the state conclusively determines what that practice is. Such a position nullifies the jurisdiction of this court in these respects and makes any proceeding thereunder a mere futility. Under the position maintained by appellant the state court might proceed with the most obvious and complete disregard of its established practice and in the clearest violation of its jurisdiction. Nevertheless if the Supreme Court

of the state should sustain the practice, the door is closed to any inquiry under writ of *habeas corpus* and the two grounds for jurisdiction of this court, quoted above, would necessarily fail. On the contrary, the court has taken exactly the opposite position. The procedure under writ of *habeas corpus*, is no longer the common law proceeding. As this court well stated in the case of *Frank vs. Mangum*, on page 330:

> "It results that under the section cited a prisoner in custody, pursuant to the final judgment of a state court of criminal jurisdiction, may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against it."

In the case of *Moore vs. Dempsey*, 261 U. S., page 86, five negroes were convicted of murder in the first degree and sentenced to death by the court of the State of Arkansas. This conviction was sustained by the Supreme Court of the state. There was no question of the initial jurisdiction of the court. This court in its opinion, referring to the *Frank vs. Mangum case*, says on page 91:

> "We assume in accordance with that case that the corrective processes applied by the state may be so adequate that interference by *habeas corpus* ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of

public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights."

The Court then comments upon the fact that the Supreme Court of the State of Arkansas had sustained the verdict and concludes with the following language on page 92:

"We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States *to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.* We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable, that the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed."

B. WILL THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS OF LAW SUSTAIN A PROCEDURE UNDER WHICH THE DISTRICT ATTORNEY IN HIS SOLE DISCRETION MAY JOIN TWO OR MORE INDICTMENTS FOR MURDER FOR ONE TRIAL, THE DEFENDANT HAVING NO RIGHT TO OBJECT AND THE COURT HAVING NO FUNCTION TO PERFORM?

We have heretofore argued that the trial court lost its jurisdiction because it proceeded in its trial in a manner not only unauthorized, but expressly prohibited by the statutes regulating the exercise of such jurisdiction and by the long established practice. We now come to the proposition that the practice actually followed in this case is so inherently vicious, so repugnant to every conception of the fundamental rights of defendants under our body of law, that without regard to questions of statutory jurisdiction this procedure must be condemned as denying to the defendant due process of law.

We have pointed out that wherever consolidation of separate indictments for separate felonies has been permitted, it has been permitted after the exercise of a judicial discretion, the purpose of that judicial discretion being to ascertain whether or not in the particular case such a procedure would deny to the defendant his right to a fair and impartial trial. The statute of the United States permitting the joinder of indictments in such cases recognizes this rule of judicial discretion by inserting the words "which may be properly joined" (p. 70 *infra*). This safeguard of the defendant's right is entirely obliterated in Pennsylvania if this case stands. Admittedly there was no exercise of judicial discretion. The only discretion exercised was that of the District Attorney, who, under

the practice contended for, performs the judicial function and decides whether or not the cases should be tried together. If in his discretion he can unite two charges for murder, he can unite more than two, or he may unite any number of felonies if he sees fit to do so. It is disposed of simply by the remark of the trial judge on motion for new trial (R., 222): "This reason is without merit," and the remark of the Pennsylvania Supreme Court (R., 236): "The simultaneous trial on two indictments charging murder is warranted."

This statement is without reservation or limitation and it is made in a case in which admittedly there was no exercise of judicial discretion.

It is apparent from the testimony offered by appellant that a vicious practice has grown up during recent years in Allegheny County, which is thus stated by the District Attorney, under whom this case was tried (R., 296):

> "It has been the practice ever since I have been in the District Attorney's office that where there was no objection on the part of the defendant, both murder cases, under those circumstances, were tried together by one jury, tried at the same time. If there is any objection on the part of the defense, we treat it as a matter of right for him to object, but if * * * do not object, we very frequently try them together *unless the Commonwealth felt it was better for their interest to try them separately.*"

While the District Attorney does not go as far as the Supreme Court and hold that the defendant has no right to object, he flatly says that the matter of joinder of indictments in one trial is entirely within the discretion of the prosecuting officer. Judge Row-

and, formerly District Attorney, testifies to the same practice in his court and says that although there were two cases joined, but twenty challenges would be allowed (R., 301). He says also that in such cases the Court takes no action (R., 303) but he has not considered whether or not the defendant may object as a matter of right. Judge Haymaker, formerly District Attorney, states the practice (R., 305):

> "If the defendant has been arraigned on two or *three* separate indictments, if he does not elect to be tried upon one and there is no objection on the part of his counsel, he is invariably tried upon all of the indictments at one time."

He also says (R., 306) that objection to joint trial would be sustained, and on page 307:

> "The judge trying the case would simply take no initiative in the matter at all. He would wait to hear from the counsel for the defendant."

As appears from the testimony of many attorneys offered by relator and referred to above (R., 250 *et seq.*), such procedure is entirely unknown anywhere else in the state, and consideration of it never reached the Supreme Court of this state until in the instant case.

It is clear, therefore, that the appellant contends and rests the validity of the verdict, judgment and sentence in this case upon this flat proposition.

The prosecuting attorney may in his discretion join in one trial any number of indictments. The judge sits mute, the prisoner has no right to object and verdict of conviction under such procedure is "warranted." It will be observed that while the officers of the Allegheny County Court more or less vaguely believe that the prisoner has a right to object,

the Supreme Court brushes this consideration aside and wipes out his right to object.

The District Attorney, inevitably influenced by the bias of counsel and considerations of convenience, seizes upon and exercises the judicial function and his decision cannot be reviewed. It may explain but does not excuse the position of the Allegheny County Court officers, that they are conducting criminal courts in a great industrial center; that they have a huge grist of criminal cases in which the defendants are very largely illiterate, insignificant and unconsidered foreigners, for whom there is no public consideration and against whom there is apt to be very considerable prejudice. It is not strange that under such circumstances prosecuting attorneys, in their hurry to clear up their docket and in their desire to make a creditable record of convictions, should take short-cuts and should be satisfied with the exercise of their own discretion. It is not strange that trial judges, sitting through the weary grind of such cases, should relax their vigilance for the protection not only of the right of the original prisoner but of the fundamental rights of American citizens.

In the instant case this procedure becomes particularly obnoxious to all sense of justice when it is recalled that the defendant was an illiterate foreigner who could have no knowledge whatever of his rights, and who was defended, as we shall later point out, by an officer of the Commonwealth of Pennsylvania appointed under the statute of Pennsylvania to conduct his defense.

The principle here contended for is recognized by this court in the case of *Pointer vs. United States*, 151 U. S., 396, 400:

> "It is provided by section 1024 of the Revised Statutes—following, substantially, the words of the act of February 26, 1853, c. 80, 10 Stat., 161, that 'when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts; and if two or more indictments are joined in such cases, the court may order them to be consolidated.'
>
> Although the two murders in question are alleged to have been committed by the defendant on the same day, and in the same county and district, it does not affirmatively appear from the indictment that they were the result of one transaction, or that they were 'connected together.' But the indictment does show upon its face that the two offenses are of the same class or grade of crimes, and subject to the same punishment. Could both crimes properly be joined in one indictment, in separate counts? The statute does not solve this question, but leaves the court to determine whether, in a given case, a joinder of two or more offenses in one indictment against the same person is consistent with the settled principles of criminal law. *If those principles permit the joinder of two or more felonies in the same indictment, in separate counts, then the joinder in question here was proper.*"

It will be observed that this statute is sustained on the express ground that the court exercised its discretion. The cases cited by the Supreme Court in that opinion all sustain our position. Not one of them was a capital case. They are as follows:

Logan vs. U. S., 144, U. S., 263. The charge was conspiracy (misdemeanor), and indictments were consolidated under Act of Congress.

Commonwealth vs. Gillespie, 7 S. & R., 469. Indictment for conspiracy to sell lottery tickets and separate counts for sale of different tickets. The court said that the several counts were different modes of laying the same offense.

People vs. Yates, 13 Wend., 311. Defendant charged in one indictment with two separate offenses of obtaining signatures by false pretenses committed at different times. Apparently misdemeanors. Held, it was no error to join counts in one indictment, but the indictment was quashed for other reasons.

U. S. vs. O'Callahan, 6 McLean, 596. Distinct counts in one indictment charging the passing of counterfeit coins at different times and on different occasions. The Court said that the Federal statute allowed such practice, and went further to say that "This may perhaps have been done to meet the proof."

Kane vs. People, 8 Wendell, 203. (Misdemeanors.) Defendant was charged with failure to repair roads as director in two companies. The same transaction.

Carlton vs. Commonwealth, 5 Metcalf, 532. The same transaction. One count was burglary and the other larceny in stealing cloak at the same time.

The main ground urged for reversal was joining the times for two separate offenses in one sentence.

Commonwealth vs. Hills, 10 Cushing, 530. Separate counts charging three separate offenses of receiving and aiding in the concealment of stolen goods. The Court was not sure that the crimes were felonies, but said that long-established practice in Massachusetts allowed the joining of distinct larcenies in the same indictment and also the joining of distinct counts for receiving stolen goods in the same indictment.

Burk vs. State, 2 H. & J., 426 (Md.). The same transaction. One count rape and the other assault with intent to commit rape. One felony and one misdemeanor. Attorney General elected to go ahead on one count and abandoned the other count before the jury was sworn.

Stores vs. State, 3 Mo., 7. (Misdemeanors.) Selling liquor. Several sales to different persons set forth in the same count. Judgment affirmed. The Court said:

> "It is held that even distinct felonies of the same character and degree, though committed at different times, may be charged in the same indictment and it will be no ground either of demurrer or arrested judgment. *1 Chitt.,* L. P., 171."

Baker vs. State, 4 Pike, 56 (Ark.). Same transaction. One count for shooting at J. F. with intent to kill and the other count for shooting and disabling J. F. Both counts put in to meet the single charge.

Campbell vs. State, 9 Yerger, 333 (Tenn.). Same transaction. Charge was theft of fifty dollar bank-

note. There were three counts put in different ways to meet the evidence. The one for stealing and the other two for receiving the stolen banknote from different persons. The Court said:

> "But every separate count charges the defendant as if he had committed a distinct offense *because it is upon the principle of the joinder of offenses that the joinder of counts is admitted. 1 Chitt. Criminal Law*, 249.

Wright vs. State, 4 Humphreys, 194 (23 Tenn.). Same transaction. Different counts to meet the evidence under one offense of rape.

Johnson vs. State, 29 Ala., 62. Same transaction. Distinct counts of obtaining money by false pretenses and larceny to meet the evidence. Same facts.

Weinzorpflin vs. State, 7 Blackford, 186 (Ind.). Same transaction. The three counts were rape, assault and battery and assault and battery to commit rape.

State vs. Hazard, 2 R. I., 474. Same transaction. The counts were (1) stealing and (2) receiving same goods, knowing them to be stolen.

Hoskins vs. Georgia, 11 Ga., 92. Same transaction. The first count was making forged instrument. In the second count the same instrument was called an order or bill. The third count was uttering the same paper and the fourth count was having the same paper in possession with intent to fraudulently pass the same.

This practice becomes if possible still more obnoxious in view of the following facts.

The Act of March 22, 1907, P. L. 31, Section 2, provides as follows:

"Whenever any person, being under indictment, charged with murder, shall make and file with the clerk of the court of quarter sessions an affidavit, setting forth that he or she is wholly destitute of means to employ counsel and prepare for his or her defense, the judge sitting in the court of oyer and terminer, to whom such affidavit is presented, shall assign to such person counsel, not exceeding two, to represent and defend such person at the trial of the case; and when services are rendered by counsel, in pursuance of such assignment, the judge sitting at the trial of the case may allow such counsel all personal and incidental expenses, upon a sworn statement thereof being filed with the clerk of the court of quarter sessions, and also reasonable compensation for services rendered, not exceeding two hundred dollars for each counsel; which allowance of expenses and compensation shall be a charge upon the county in which the indictment in the action is found, to be paid by the county treasurer, or, where the city and county are coextensive, by the city treasurer, upon the certificate of the judge presiding at the trial of the case; Provided, That in order to be entitled to such expenses and compensation, counsel so assigned must file with the judge, sitting at the trial of the case, an affidavit that he has not, directly or indirectly, received, nor entered into a contract to receive any compensation for such services from any source other than herein provided."

On February 6, 1923, F. A. Ammon, Esq., was appointed attorney for defendant under the provisions of the above Act (R-10).

A similar order was entered in the Hopkins case.

The record shows that Mr. Ammon was the sole counsel for Valotta until after the expiration of time for taking out a writ of error to the Supreme Court:

As to why such writ of error was not taken out, we refer to Mr. Ammon's testimony (R-289 *et seq.*). It appears that it was not taken out because it was impossible to raise at least Twelve Hundred ($1200) Dollars for printing the record.

The Acts of Congress cited below provide that in case of poverty an appeal may be taken *informa pauperis.*

Act of July 20, 1892, 27 St. at L. as amended June 25, 1910, 36 St. at L. 866.

> "That any citizen of the United States, entitled to commence or defend any suit or action, civil or criminal, in any court of the United States, may upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or a writ of error, or an appeal to the Circuit Court of Appeals, or to the Supreme Court in such suit or action, including all appella[illegible] proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after

bringing suit or action, or upon suing out a writ of error or appealing, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks by such suit or action or writ of error or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal."

Counsel appointed by the Court to defend Valotta was not advised of this act and the appeal was not taken out because it was impossible to raise a sum in excess of Twelve Hundred ($1200) Dollars for printing the record.

The Court which tried this case appointed counsel for Valotta under the express provisions of the statute cited. By so doing the Commonwealth, through this court, gave solemn assurance to the defendant that he could rely upon the guidance and advice of the counsel so appointed. It appears that this counsel received from the state a fee of $200.00 in each case.

It was not the poverty of this defendant which prevented the taking out of a writ of error, for the law has mercifully provided against such contingency. Valotta was not given the benefit of this provision of law, through the failure of the official counsel appointed for him by the Court.

Finally: We appeal to the Court to consider this case not as a matter of private concern affecting the life of a particular individual, serious as that

may be, but as a case affecting the fundamental rights, liberties, immunities and privileges of every citizen of the Commonwealth of Pennsylvania. Legal safeguards are not destroyed in the trial of exalted personages. They may be insidiously undermined, diminished and eventually swept away in the hurried and routine trial of insignificant defendants. Precedent so established will, if permitted to persist, eventually have the force of law and we may awake later to find that the priceless heritage of law and right, handed down to us by the fathers, has been lost by mere attrition and indifference.

It was for the purpose of protection against such a situation that the Fourteenth Amendment was adopted and it has been so interpreted and applied since its adoption for more than half a century.

Respectfully submitted,

GEORGE R. WALLACE,
Of Counsel for Appellee.